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8 REDBUBBLE INC.

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13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 Atari INTERACTIVE, INC.,

17 CASE NO. 3:18-CV-03451-JST

18 Plaintiff,

19 v.
20
21 DEFENDANT REDBUBBLE INC.'S
22 ANSWER TO COMPLAINT

23 REDBUBBLE INC.,

24 Defendant.

25
26 JURY TRIAL DEMANDED

27
28 Defendant Redbubble Inc. ("Redbubble") hereby answers the Complaint of plaintiff Atari
29 Interactive, Inc. ("Atari"), on personal knowledge as to its own activities and on information and
30 belief as to the activities of others, as follows.

31
32 **RESPONSE TO SPECIFIC ALLEGATIONS**

33
34 1. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
35 of Paragraph 1 of the Complaint and on that basis denies those allegations.

36
37 2. Redbubble admits the allegations of Paragraph 2 of the Complaint.

1 3. Answering the allegations of Paragraph 3 of the Complaint, Redbubble admits that this
2 Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338. Except as
3 thus expressly admitted, Redbubble denies the allegations of Paragraph 3.

4 4. Answering the allegations of Paragraph 4 of the Complaint, Redbubble admits that
5 venue is proper in this district under 28 U.S.C. § 1391 because Redbubble is subject to personal
6 jurisdiction here. Except as thus expressly admitted, Redbubble denies the allegations of Paragraph 4.

7 5. Answering the allegations of Paragraph 5 of the Complaint, Redbubble admits that this
8 Court has personal jurisdiction because Redbubble is based in California. Except as thus expressly
9 admitted, Redbubble denies the allegations of Paragraph 5.

10 6. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
11 of Paragraph 6 of the Complaint and on that basis denies those allegations.

12 7. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
13 of Paragraph 7 of the Complaint and on that basis denies those allegations.

14 8. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
15 of Paragraph 8 of the Complaint and on that basis denies those allegations.

16 9. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
17 of Paragraph 9 of the Complaint and on that basis denies those allegations.

18 10. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
19 of Paragraph 10 of the Complaint and on that basis denies those allegations.

20 11. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
21 of Paragraph 11 of the Complaint and on that basis denies those allegations.

22 12. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
23 of Paragraph 12 of the Complaint and on that basis denies those allegations.

24 13. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
25 of Paragraph 13 of the Complaint and on that basis denies those allegations.

26 14. Redbubble lacks knowledge or information sufficient to admit or deny the allegations
27 of Paragraph 14 of the Complaint and on that basis denies those allegations.

15. Answering the allegations of Paragraph 15 of the Complaint, Redbubble admits that it describes itself on its website as a “global online marketplace powered by artists,” and that it is in fact a global online marketplace powered by artists. Except as thus expressly admitted, Redbubble denies the allegations of Paragraph 15.

16. Answering the allegations of Paragraph 16 of the Complaint, Redbubble admits that users can upload designs to the Redbubble marketplace. Except as thus expressly admitted, Redbubble denies the allegations of Paragraph 16 of the Complaint.

17. Redbubble denies the allegations of Paragraph 17 of the Complaint.

18. Redbubble denies the allegations of Paragraph 18 of the Complaint.

19. Redbubble denies the allegations of Paragraph 19 of the Complaint.

20. Redbubble denies the allegations of Paragraph 20 of the Complaint.

FIRST CAUSE OF ACTION

(Trademark Counterfeiting and Counterfeiting)

21. Answering the allegations of Paragraph 21 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-20 of this Answer as if fully set forth herein.

22. Redbubble lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 22 of the Complaint and on that basis denies those allegations

23. Redbubble lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 23 of the Complaint and on that basis denies those allegations.

24. Redbubble denies the allegations of Paragraph 24 of the Complaint.

25. Redbubble denies the allegations of Paragraph 25 of the Complaint.

26. Redbubble denies the allegations of Paragraph 26 of the Complaint, and specifically denies that it has used Atari's trademarks.

27. Redbubble denies the allegations of Paragraph 27 of the Complaint.

28. Redbubble denies the allegations of Paragraph 28 of the Complaint.

29. Redbubble denies the allegations of Paragraph 29 of the Complaint.

30. Redbubble denies the allegations of Paragraph 30 of the Complaint.

31. Redbubble denies the allegations of Paragraph 31 of the Complaint.

SECOND CAUSE OF ACTION

(Copyright Infringement)

32. Answering the allegations of Paragraph 32 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-31 of this Answer as if fully set forth herein.

33. Redbubble lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 33 of the Complaint and on that basis denies those allegations.

34. Redbubble denies the allegations of Paragraph 34 of the Complaint.

35. Redbubble denies the allegations of Paragraph 35 of the Complaint.

36. Redbubble denies the allegations of Paragraph 36 of the Complaint.

37. Redbubble denies the allegations of Paragraph 37 of the Complaint.

38. Redbubble denies the allegations of Paragraph 38 of the Complaint.

39. Redbubble denies the allegations of Paragraph 39 of the Complaint.

THIRD CAUSE OF ACTION

(Trademark Dilution)

40. Answering the allegations of Paragraph 40 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-39 of this Answer as if fully set forth herein.

41. Redbubble lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 41 of the Complaint and on that basis denies those allegations.

42. Redbubble denies the allegations of Paragraph 42 of the Complaint.

43. Redbubble denies the allegations of Paragraph 43 of the Complaint.

44. Redbubble denies the allegations of Paragraph 44 of the Complaint.

45. Redbubble denies the allegations of Paragraph 45 of the Complaint.

FOURTH CAUSE OF ACTION

(False Designation of Origin)

46. Answering the allegations of Paragraph 46 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-45 of this Answer as if fully set forth herein.

47. Redbubble lacks knowledge or information sufficient to admit or deny the allegations of Paragraph 46 of the Complaint and on that basis denies those allegations.

48. Redbubble denies the allegations of Paragraph 48 of the Complaint.

49. Redbubble denies the allegations of Paragraph 49 of the Complaint.

50. Redbubble denies the allegations of Paragraph 50 of the Complaint, and specifically that Redbubble has used Atari's trademarks or trade dress.

51. Redbubble denies the allegations of Paragraph 51 of the Complaint.

52. Redbubble denies the allegations of Paragraph 52 of the Complaint.

53. Redbubble denies the allegations of Paragraph 53 of the Complaint.

54. Redbubble denies the allegations of Paragraph 54 of the Complaint.

55. Redbubble denies the allegations of Paragraph 55 of the Complaint.

FIFTH CAUSE OF ACTION

(Common Law Unfair Competition)

56. Answering the allegations of Paragraph 56 of the Complaint, Redbubble incorporates responses set forth in Paragraph 1-55 of this Answer as if fully set forth herein.

57. Redbubble denies the allegations of Paragraph 57 of the Complaint.

58. Redbubble denies the allegations of Paragraph 58 of the Complaint.

59. Redbubble denies the allegations of Paragraph 59 of the Complaint.

60. Redbubble denies the allegations of Paragraph 60 of the Complaint.

61. Redbubble denies the allegations of Paragraph 61 of the Complaint.

SIXTH CAUSE OF ACTION

(Contributory Trademark Infringement and Counterfeiting)

62. Answering the allegations of Paragraph 62 of the Complaint, Redbubble incorporates responses set forth in Paragraph 1-61 of this Answer as if fully set forth herein.

63. Redbubble denies the allegations of Paragraph 63 of the Complaint.

64. Redbubble denies the allegations of Paragraph 64 of the Complaint.

65. Redbubble denies the allegations of Paragraph 65 of the Complaint.

66. Redbubble denies the allegations of Paragraph 66 of the Complaint.

SEVENTH CAUSE OF ACTION
(Contributory Copyright Infringement)

67. Answering the allegations of Paragraph 67 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-66 of this Answer as if fully set forth herein.

68. Redbubble denies the allegations of Paragraph 68 of the Complaint.

69. Redbubble denies the allegations of Paragraph 69 of the Complaint.

70. Redbubble denies the allegations of Paragraph 70 of the Complaint.

71. Redbubble denies the allegations of Paragraph 71 of the Complaint.

EIGHTH CAUSE OF ACTION

(Vicarious Trademark Infringement and Counterfeiting)

72. Answering the allegations of Paragraph 72 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-71 of this Answer as if fully set forth herein.

73. Redbubble denies the allegations of Paragraph 73 of the Complaint.

74. Redbubble denies the allegations of Paragraph 74 of the Complaint.

75. Redbubble denies the allegations of Paragraph 75 of the Complaint.

NINTH CAUSE OF ACTION

(Vicarious Copyright Infringement)

76. Answering the allegations of Paragraph 76 of the Complaint, Redbubble incorporates the responses set forth in Paragraph 1-75 of this Answer as if fully set forth herein.

77. Answering the allegations of Paragraph 77 of the Complaint, Redbubble admits that it receives a service fee for all third-party product sales that occur via the Redbubble marketplace.

Except as thus expressly admitted, Redbubble denies the allegations of Paragraph 77.

78. Redbubble denies the allegations of Paragraph 78 of the Complaint.

79. Redbubble denies the allegations of Paragraph 79 of the Complaint.

1 **AFFIRMATIVE DEFENSES**

2 Without admitting or acknowledging that it bears any burden of proof as to any of them,
3 Redbubble asserts the following affirmative defenses:

4 **FIRST AFFIRMATIVE DEFENSE**

5 **(Failure to State a Claim)**

6 80. The Complaint, and each cause of action therein, fails to state facts sufficient to state a
7 claim on which relief may be granted.

8 **SECOND AFFIRMATIVE DEFENSE**

9 **(Failure to Provide Notice)**

10 81. Atari's secondary infringement claims are barred, in whole or in part, because Atari
11 failed to provide proper notice of the alleged infringement, which is Atari's burden to prove.

12 **THIRD AFFIRMATIVE DEFENSE**

13 **(Lack of Knowledge of Specific Infringement)**

14 82. Atari's secondary infringement claims are barred, in whole or in part, because
15 Redbubble lacked actual, specific and/or contemporary knowledge of the alleged infringement.

16 **FOURTH AFFIRMATIVE DEFENSE**

17 **(DMCA Section 512(c))**

18 83. Atari is barred from obtaining monetary or broad injunctive relief on its copyright
19 infringement claim because Redbubble has complied with and is entitled to protection of the safe
20 harbor provisions of Section 512(c) of the Digital Millennium Copyright Act.

21 **FIFTH AFFIRMATIVE DEFENSE**

22 **(Non-Trademark Use)**

23 84. Atari's Lanham Act and unfair competition claims are barred, in whole or in part,
24 because at least certain of the allegedly infringing uses of Atari's asserted trademark(s) were done
25 other than as a trademark or service mark and thus do not create a likelihood of confusion.

SIXTH AFFIRMATIVE DEFENSE (Ornamental Use)

85. Atari's Lanham Act and unfair competition claims are barred, in whole or in part, because at least certain of the allegedly infringing uses of Atari's asserted trademark(s) were ornamental in nature and thus do not create a likelihood of confusion.

SEVENTH AFFIRMATIVE DEFENSE

(Fair Use)

86. Atari's claims are barred, in whole or in part, because at least certain of the allegedly infringing uses of Atari's asserted trademark(s) and/or copyright(s) were fair uses.

EIGHTH AFFIRMATIVE DEFENSE (Protected Speech)

87. Atari's Lanham Act and unfair competition claims are barred, in whole or in part, because at least certain of the allegedly infringing uses of Atari's asserted trademark(s) were protected speech under the First Amendment of the United States Constitution and the California Constitution.

NINTH AFFIRMATIVE DEFENSE (Failure to Mitigate)

88. Atari's claims are barred, in whole or in part, because Atari failed to mitigate its alleged damages.

TENTH AFFIRMATIVE DEFENSE (Unclean Hands)

89. Atari's claims are barred, in whole or in part, under the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE

(Laches/Statute of Limitations)

90. Atari's claims are barred, in whole or in part, under the doctrine of laches and/or the relevant statute of limitations

1 **TWELFTH AFFIRMATIVE DEFENSE**
2 **(Waiver)**

3 91. Atari's claims are barred, in whole or in part, under the equitable doctrines of waiver,
4 acquiescence and/or estoppel

5 **THIRTEENTH AFFIRMATIVE DEFENSE**
6 **(Misuse)**

7 92. Atari's claims are barred, in whole or in part, because Atari has misused its trademarks
8 and copyrights by enforcing and/or attempting to enforce them beyond their lawful scope.

9 **FOURTEENTH AFFIRMATIVE DEFENSE**
10 **(Conduct of Third Parties)**

11 93. Atari's claims are barred, in whole or in part, because the actions complained of, to the
12 extent they occurred, were the result of the conduct of third-parties.

13 **FIFTEENTH AFFIRMATIVE DEFENSE**
14 **(Unilateral Proactive Conduct)**

15 94. Atari's claims are barred, in whole or in part, because Redbubble has implemented
16 screening procedures to identify remove potentially infringing items as soon as reasonably practical,
17 although Redbubble is under no legal obligation to do so.

18 **SIXTEENTH AFFIRMATIVE DEFENSE**
19 **(Reasonable Steps)**

20 95. Atari's claims are barred, in whole or in part, because Defendant has taken all
21 reasonable steps to remove all items from its website as soon as practical after being made aware of
22 such alleged infringement and/or prohibited use by Atari.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Redbubble requests entry of judgment in its favor and against Atari on
25 Atari's Complaint as follows:

26 A. Directing that Atari take nothing by way of its Complaint and dismissing Atari's
27 Complaint with prejudice;

- 1 B. Declaring that Atari's asserted copyrights and trademarks are unenforceable and/or not
2 infringed by Redbubble;
3 C. Awarding Redbubble its costs of suit, including reasonable attorneys' fees;
4 D. Granting any and all other relief that the Court deems just and proper.

5
6 Dated: July 26, 2018

COASTSIDE LEGAL

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8 By: /s/ Kenneth B. Wilson
9 KENNETH B. WILSON

10 Attorneys for Defendant
11 REDBUBBLE INC.

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, defendant Redbubble requests a trial by jury of any issues so triable.

Dated: July 26, 2018

COASTSIDE LEGAL

By: /s/ Kenneth B. Wilson
KENNETH B. WILSON

Atorneys for Defendant
REDBUBBLE INC.